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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

JEFF KUO, Plaintiff and Appellant, v. REBECCA YEN-CHUN LIU, Defendant and Respondent.	A164928 (Contra Costa County Super. Ct. No. D15-03749)

In this martial dissolution action, the trial court ordered appellant Jeff Kuo to pay respondent Rebecca Yen-Chen Liu $13,000 monthly in permanent spousal support retroactive to March 30, 2016 and $175,000 in attorney fees. Jeff argues that the trial court abused its discretion in calculating his ability to pay spousal support based on gifts or loans received from his parents in the first half of 2013, that it abused its discretion in awarding Rebecca $175,000 in attorney fees based entirely on his ability to obtain money "with no demonstrated limit" from his parents, and that the court was without jurisdiction to make the spousal support award retroactive. We agree, and we reverse.

BACKGROUND

Jeff and Rebecca were married on March 29, 2003, and subsequently had two children together.[1]

The parties separated on July 1, 2013. On July 30, 2015, Jeff filed a petition to dissolve the marriage. On January 12, 2016, Rebecca filed a response to the petition in which she also requested dissolution of the marriage, as well as spousal support and attorney fees.

In May of 2016, the parties agreed that beginning June 1, 2016, Jeff would pay Rebecca $2,909 per month in child support and $2,091 per month in temporary spousal support.

On December 8, 2016, the parties stipulated to a bifurcated judgment dissolving their marriage, with the court reserving jurisdiction to determine various other issues.

On December 4 and 5, 2019, and November 16 and 17, 2020, the court held a hearing on several issues, including the division of property, child support, permanent spousal support, attorney fees, custody, and visitation. Jeff and Rebecca both testified. The testimony relating to the parties income and attorney fees was as follows:

At the time of the hearing and throughout the parties' marriage, Jeff worked full-time for Agriculture Bag and CHK Manufacturing—companies owned by his parents that produce and market polywoven bags for agricultural goods. For the years 2007–2013, Jeff's tax returns showed the following income from his employment at Agriculture Bag and CHK: (1) 2008 – $69,689, (2) 2009 – $81,133, (3) 2010 – $104,400 (4) 2011 – $112,000,

[1] As typical in marital dissolutions cases, we refer to the parties by their first name.

(5) 2012 – $117,733, (6) 2013 – $159,800, (7) 2014 – $141,700, (8) 2015 – $124,654, (9) 2016 – $192,663, and (10) 2017 – $170,042.

In the summer of 2018, Jeff began earning $10,000 a month from Agricultural Bag and $5,000 a month from CHK, for a total yearly income of $180,000. Although Jeff had previously received additional employment benefits—including free gas, health insurance worth about $700 a month, car insurance and repairs, and a cell phone—those benefits ended with his new employment contract in 2018, after which he had to pay for these expenses himself.

Two or three years after they got married, Jeff and Rebecca moved to a house in Danville purchased by Jeff's parents. In 2009, Rebecca and the children moved to Taiwan, to a house purchased by Jeff's parents, while Jeff continued to live in the Danville house.

In June of 2016, Rebecca and the children moved back to the Danville house, while Jeff moved to an apartment on Main Street in San Francisco owned by MJK Pacific Capital, a real estate company started by his parents and his brother. Jeff estimated that the rental value of the San Francisco apartment was around $6,000 a month. In 2018, Jeff moved to an apartment in Oakland also owned by his family's real estate company. In June of 2018, Jeff began paying $3,200 a month in rent for the Oakland apartment.

During the marriage, Jeff used an American Express credit card for personal expenses. His parents helped him pay the credit card bill, either giving him the money or sending it directly to American Express. The American Express statements showed total charges of (1) $52,509 for 2008, (2) $32,363 for 2009, and (3) approximately $80,000 for 2011. Between January and July of 2013, the total payments made to American Express were about $60,000.

Jeff also had a Citibank bank account, deposits into which were either his paychecks or money from his parents. The Citibank statement showed total deposits of (1) $218,276 for 2008, (2) $202,276 for 2009, (3) $141,770 for 2010, (3) 189,036 for 2011, and (4) $179,512 for 2012. Between January and July of 2013, $134,551 was deposited into the Citibank account.

Jeff testified that the parties did not have any savings during the marriage, but instead lived paycheck to paycheck. Jeff continues to live paycheck to paycheck, and has no retirement accounts, pension plan or other assets, apart from a wine collection and a Chevy Volt.

Some two or three years before the hearing, Jeff "started to cut down spending." He closed the American Express account in 2016 and no longer uses credit cards. Jeff's parents have not allowed him to borrow money from them since June of 2018. As for his attorney fees, Jeff testified:

"Q. Okay. And, okay. And who has paid your attorney's fees?

"A. My family members.

"Q. And how come?

"A. I don't have that much income to support the case since—living paycheck by paycheck."

Rebecca testified that her father had made loans to her totaling $300,000 toward living expenses and attorney fees. She had paid $250,000 in attorney fees as of June 2019, and still owed her attorneys $65,000.

After the hearing, the parties submitted written closing arguments and replies. Rebecca argued that because Jeff "historically received additional, non-taxable income that exceeded his salary over the years (either directly in cash deposits or indirectly in the form of payments on his credit cards)"—totaling $1,272,523 over the six years of the marriage—the court should add some $121,338 to Jeff's income as reflected on his tax returns. She also asked

that the fair market value of his rent, car insurance, and health insurance—some $6,783 per month—be added to his income for a total of $33,089 or $397,068 per year. Rebecca requested permanent spousal support of $20,000 per month. Jeff argued that based on his monthly income of $15,000 and his other expenses, $2,000 a month was the most support he could afford. Jeff requested that the court set permanent support at $1,000 per month for three months with a step down to $500 per month for the three months after that, and then terminate support.

Rebecca also requested $200,000 in attorney's fees pursuant to Family Code[2] sections 271 and 2030, arguing that Jeff had "greater access to income, assets, and additional funds," and was "employed by the family businesses and has the support of his family and their corporations to manage his expenses," whereas she "has no income other than support."

Jeff asked that the parties pay their own costs and attorney fees.

On May 27, 2021, the court issued a proposed statement of decision, which would subsequently become its final statement of decision. With respect to Jeff's income, the court found as follows:

"**Petitioner's income**. As noted above the court finds that the Petitioner's assertion that his monthly income is $15,000 a month is belied by the evidence of cash infusions to his bank account statements and evidence that his parents paid off his credit card statements every month. Petitioner received thousands more in cash infusions throughout the marriage from his parents than he reported in income on his tax returns. The court finds that the Petitioner's assertion that money from his parents were loans, is (1) not supported by an[y] loan documentation, (2) not credible as Petitioner

[2] Further undesignated statutory references are to the Family Code.

admitted he does not repay the money and *there is no expectation that he repay the money*, and (3) is not credible as Petitioner's only sources of income were his corporate paycheck and his parents and he was unable to distinguish any salary deposits to his bank accounts from money received from his parents. The court finds it is appropriate to calculate Petitioner's income beginning with the salary he received, the cash infusions received to his bank accounts from his parents, the credit card charges on his Amex account that his parents paid, during the period January 1, 2013 to July 2013.[3] Petitioner's income during this seven-month period averaged $27,793 a month based on these sources of information. In addition, the court finds it is appropriate to impute Petitioner with $6,000 a month for the value of the rent for the MJK apartment (or of the Danville house) that he does not pay (and which is tax free to him as it is not reported on his tax returns), plus $700 a month for health insurance, and car insurance of $83 a month (as listed on Petitioner's I & E filed August 6, 2018) which the company paid until June 2018.[4] The court finds that Petitioner's income for purposes of permanent spousal support is $34,576 a month."

And with respect to Jeff's ability to pay:

"Petitioner has no rent to pay, no mortgage payments and has lived with the support of a salary from his parent's company and direct cash infusions from his parents. He has zero or minimal outstanding debt. He

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[3] "The date of separation is July 1, 2013."

[4] "Petitioner testified that since June 2018 he now pays his own health insurance and receives less salary from AB, his parent's corporation, but the court finds that these cutbacks to his support and the alleged decrease in his salary were not done for any demonstrated corporate purpose other than to reduce his income for this divorce litigation."

asserted that he borrows money from his parents for attorney's fees for this litigation, but the court does not agree that the cash from his parents were in the nature of loans.

"The parties' standard of living was upper class. They lived a lavish lifestyle. They vacationed in five-star hotels, dined in fancy restaurants, drove a Mercedes and a Porsche, bought designer clothing, designer household furnishings, designer watches, designer jewelry, art, and expensive liquor. Petitioner purchased two rings from Tiffany's in 2010 for $8000. They socialized with the elites of Taiwan. Petitioner invested $100,000 into a company run by Chiang Kai Shek's grandson, and played golf with him (the grandson) on a monthly basis.

"There is no evidence that the parties were living beyond their means. Petitioner's support from his parents seems unlimited and his income and benefits were only reduced in June 2018 when it appears that the only motivation for reducing his income (at least on paper) was to decrease his income for purposes of this divorce litigation."

The court concluded: "Petitioner shall pay Respondent $13,000 a month in permanent spousal support on the first of the month, effective March 30, 2016."

On the issue of attorney fees, the court found as follows:

"**Attorney's fees**: Petitioner shall pay Respondent the sum of $175,000 in attorney's fees pursuant to Family Code Section 2030 and Family Code Section 271. The court finds that Petitioner has the ability to pay for both parties['] attorney's fees, as he receives financial support with no demonstrated limit from his parents and his parent's company, MJK owns real estate with a value of over $1.625 million (in 2010, eleven years ago), and Petitioner has already paid thousands to his own attorneys with money gifted

from his parents. The court finds this amount is necessary to level the unequal playing field in this litigation. Also the court finds it is an appropriate sanction for Petitioner's breaches of fiduciary towards Respondent, and for his intentional and bad faith misstatements about his income to this court."

On February 8, 2022, the court issued a judgment on reserved issues which incorporated the orders from the statement of decision on spousal support and attorney fees. The judgment also calculated that after subtracting the spousal support Jeff had already paid Rebecca, he owed her a further $680,540 in spousal support arrears from April 2016 through May 31, 2021.

Jeff filed a notice of appeal.

DISCUSSSION

Jeff argues that the trial court abused its discretion in calculating his ability to pay permanent spousal support; that it abused its discretion in making the $175,000 award of attorney fees to Rebecca; and that it erred in making the permanent spousal support award retroactive to March 30, 2016.[5] We agree.

The Trial Court Abused Its Discretion In Calculating Jeff's Ability to Pay Spousal Support

Spousal support is governed by statute. (See §§ 4300–4360.) "In ordering spousal support, the trial court *must* consider and weigh all of the circumstances enumerated in [section 4320], to the extent they are relevant to the case before it." (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 302, fn. omitted (*Cheriton*).) " 'Once the court does so, the ultimate decision as to amount and duration of spousal support rests within its broad

[5] Rebecca did not file a respondent's brief.

discretion and will not be reversed on appeal absent an abuse of that discretion. [Citation.]' (*In re Marriage of Kerr* (1999) 77 Cal.App.4th 87, 93, fn. omitted.)" (*Cheriton*, *supra*, 92 Cal.App.4th at p. 283.)

One of the factors a court setting permanent support must consider is "[t]he ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living." (§ 4320, subd. (c).) The ability to pay support is " 'a key factor' " for consideration under section 4320. (*In re Marriage of Rosen* (2002) 105 Cal.App.4th 808, 824; *Cheriton*, *supra*, 92 Cal.App.4th at p. 304.)

We conclude that the trial court abused its discretion in calculating and considering Jeff's ability to pay permanent spousal support, in several respects.

First, although the support hearing concluded and the award was made in 2021, the trial court's calculation of Jeff's ability to pay was based entirely on information from a seven-month period some eight years earlier—from January to July of 2013. But "[a] spousal support order must be consistent with the supporting spouse's ability to pay as determined by their circumstances *at the time of the support hearing*—i.e., the obligor's *present* (not past or future) circumstances (current income, assets, earning capacity, etc.) control." (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2022) ¶ 6:857a.) "The theory is that the court is trying to predict *likely* income for the immediate *future*, as distinct from extraordinarily high or low income in the *past*. [¶] And . . . *In re Marriage of Rosen, supra,* 105 Cal.App.4th at p. 821, has recently demonstrated, albeit in the context of calculating the good will in a small law practice, that the time period on which income is calculated must be long enough to be

representative, as distinct from *extraordinary*." (*In re Marriage of Riddle* (2005) 125 Cal.App.4th 1075, 1081–1082.)

Here, the trial court gave no explanation for its decision to exclusively use information from a short time period some eight years before the hearing, despite having much more recent documentary evidence and testimony regarding Jeff's income. Indeed, the court appears to have completely ignored Jeff's testimony regarding his salary and the evidence of his W-2 income in various years, imputing a yearly income to him of $414,912 and ordering him to pay support of $156,000 a year, despite that he testified to yearly income of $180,000 as of 2018 and had never had W-2 income exceeding $192,663 in any of the years 2008 through 2017—indeed, in many of those years, significantly less than that.

Similarly, the trial court erred in imputing $6,000 a month to Jeff as income "for the value of the rent for the MJK apartment (or of the Danville house)." There does not appear to be any evidence that the rental value of the Danville house was $6,000 a month, but more importantly, it was undisputed that Jeff moved out of the Danville house in 2016, and out of the MJK apartment in 2018. Whatever the market value of the rent for these properties, they had nothing to do with Jeff's income more than two years later when the support hearing was held—and nothing to do with Jeff's ability to pay spousal support in the "immediate *future*" at the time of that hearing. (*In re Marriage of Riddle*, *supra*, 125 Cal.App.4th at p. 1082.)

Second, the trial court erred in considering gifts or loans from Jeff's parents as income, without any evidence that those gifts or loans continued past 2018. "[E]arning capacity for spousal support purposes cannot be measured by a 'lavish, upper income lifestyle' made possible only by periodic cash 'advances' from one party's parents that have ceased and absent any

evidence they will resume." (Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 6:966.1; see *In re Marriage of Williamson* (2014) 226 Cal.App.4th 1303, 1316–1317 ["Having found that [Frederick's parents] are no longer advancing funds to Frederick, the trial court appropriately based its spousal support order on Frederick's ability to pay, rather than that of his parents"].) That appears to be exactly what happened here. Jeff testified that he had closed his American Express credit card account and his parents stopped loaning or gifting him money in 2018. Absent any evidence that Jeff continued to receive cash advances from his parents or would do so in the future, the trial court abused its discretion by including cash received from his parents in 2013 in calculating Jeff's ability to pay spousal support.[6]

We will thus reverse and remand for a new calculation of permanent spousal support.

The Trial Court Abused Its Discretion in Making the Attorney Fee Award Without Considering Jeff's Ability to Pay

As noted, the trial court ordered Jeff to pay Rebecca $175,000 in attorney's fees pursuant to section 2030, finding that Jeff "has the ability to pay for both parties['] attorney's fees, as he receives financial support with no demonstrated limit from his parents and his parent's company, MJK owns real estate with a value of over $1.625 million (in 2010, eleven years ago), and Petitioner has already paid thousands to his own attorneys with money gifted from his parents," concluding that the award "is necessary to level the unequal playing field in this litigation." The court also awarded the fees

[6] In addition, as Jeff notes, the $134,551 given to Jeff by his parents between January and July of 2013 included some or all of the $60,000 paid to American Express during that same time period, meaning the trial court double counted up to $60,000 as part of Jeff's "income."

under section 271, finding that the award was "an appropriate sanction for Petitioner's breaches of fiduciary towards Respondent, and for his intentional and bad faith misstatements about his income to this court."

"[S]ection 2030 permits the trial court to order payment of attorney fees and costs as between the parties based upon their 'ability to pay' and their 'respective incomes and needs' in order to 'ensure that each party has access to legal representation to preserve all of the party's rights.' (§ 2030, subd. (a).) 'The purpose of such an award is to provide one of the parties, if necessary, with an amount adequate to properly litigate the controversy.' (*In re Marriage of Duncan* [(2001)] 90 Cal.App.4th [617,] 629.) The trial court may award attorney fees under section 2030 'where the making of the award, and the amount of the award, are just and reasonable under relative circumstances of the respective parties.' (§ 2032, subd. (a).)

" 'In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320.' (§ 2032, subd. (b).) The parties' circumstances described in section 4320 ' "include assets, debts and earning ability of both parties, ability to pay, duration of the marriage, and the age and health of the parties." ' (*In re Marriage of Duncan*, *supra*, 90 Cal.App.4th at p. 630.) In assessing one party's need and the other's ability to pay, the court may consider evidence of the parties' current incomes, assets, and earning abilities. (*Ibid.*)" (*In re Marriage of Rosen*, *supra*, 105 Cal.App.4th at p. 829.)

" 'It is well established in California that, although the trial court has considerable discretion in fashioning a need-based fee award [citation], the

record must reflect that the trial court actually exercised that discretion, and considered the statutory factors in exercising that discretion.' (*In re Marriage of Braud* (1996) 45 Cal.App.4th 797, 827, fn. omitted.)" (*Cheriton*, *supra*, 92 Cal.App.4th at p. 315; see *Alan S. v. Superior Court* (2009) 172 Cal.App.4th 238, 254 (*Alan S.*).) We likewise review an award of fees as a sanction under section 271 for abuse of discretion. (*In re Marriage of Corona* (2009) 172 Cal.App.4th 1205, 1225.)

The record here does not establish that the trial court considered the relevant statutory factors in the exercise of its discretion. The fee award was based entirely on the court's finding that Jeff "receives financial support with no demonstrated limit from his parents and his parent's [real estate] company," and the finding that he "has already paid thousands to his own attorneys with money gifted from his parents." While gifts from a party's parents used to pay attorney fees can be one factor to consider in making a need-based fee award where those gifts are "regular" and "recurring," the trial court was also required to also consider Jeff's assets and ability to pay in making the award. (See § 4320; Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶¶ 14:160, 14:164.) And the trial court made no mention of Jeff's assets or ability to pay, ability to pay that, as discussed, the trial court miscalculated in the context of spousal support as $414,912 a year.

In addition, there is no indication that the trial court considered the "relative circumstances" of the parties or "whether there is a disparity in access to funds to retain counsel." (§ 2032, subd. (a); § 2030, subd. (a)(2); see Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 14:164 ["[Section] 2030 appears to make *disparity* in access to legal representation—whether due to disparity in the parties' own income, disparity in their 'access to funds' or disparity in ability to pay for any other reason—the *central focus*

in deciding whether a § 2030 need-based fees request should (or indeed, *must*) be granted"].) In particular, the court made no mention of Rebecca's testimony that she had received a "loan" from her father of approximately $300,000 to cover her attorney fees and living expenses, an amount only slightly less than the approximately $315,000 in fees she had incurred—and much greater than the $65,000 she still owed. (See *Alan S.*, *supra*, 172 Cal.App.4th at p. 254 [fee award "should be the product of a nuanced process in which the trial court should try to get the 'big picture' of the case, i.e., 'the relative circumstances of the respective parties' as the statute puts it" and not based entirely on "which party has the higher nominal income relative to the other"].) We conclude that the trial court failed to adequately consider the statutory factors and therefore abused its discretion.

Nor was the attorney fee award appropriate under section 271, which provides that "the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys." (§ 271, subd. (a).) Section 271 expressly requires the court to "take into consideration all evidence concerning the parties' incomes, assets, and liabilities," and prohibits any sanction "that imposes an unreasonable financial burden" on the sanctioned party. (*Ibid.*; see *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 828 ["[section 271] sanction must be scaled to the payor's ability to pay and must be made in light of both parties' financial circumstances"].) Because the record does not reflect that the trial court properly calculated or considered Jeff's assets and ability to pay in making its sanction award, it abused its discretion under section 271.

The Retroactivity of the Spousal Support Award Must be Reevaluated on Remand

Jeff also argues that the court was without jurisdiction to make its permanent spousal support order retroactive to March 30, 2016—the date that Rebecca filed her request for *temporary* spousal support.

Section 4333 allows the court to make a permanent spousal support order "retroactive to the date of filing the notice of motion or order to show cause, or to any subsequent date." In contrast to temporary spousal support, the court may not make such an order effective as of some earlier date, including the date of filing of the petition for dissolution. (See *In re Marriage of Mendoza & Cuellar* (2017) 14 Cal.App.5th 939, 943–944.)

Jeff asserts that Rebecca never filed a notice of motion or order to show cause regarding permanent spousal support. Because the support award must be vacated for the reasons already discussed, we will order that the trial court make the effective date of any new permanent spousal support order consistent with section 4333.

DISPOSITION

The judgment is reversed with respect to the permanent spousal support award and the award of attorney fees, and remanded for the limited purpose of recalculating those awards and the effective date of the permanent spousal support award consistent with this opinion. Jeff shall recover his costs on appeal.

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Richman, J.

We concur:

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Stewart, P.J.

_____
Miller, J.

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